

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1111

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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AYS

UNITED STATES OF AMERICA,

Appellee,

v.

ENRIQUE MELENDEZ,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

BRIEF FOR THE APPELLANT

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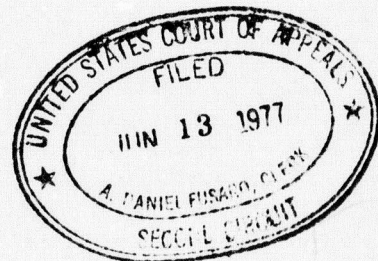


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QUESTIONS PRESENTED

1. DID PREJUDICIAL COMMENTS AND REMARKS MADE BY THE ASSISTANT U.S. ATTORNEY IN HIS OPENING SUMMATION DENY APPELLANT A FAIR TRIAL?
2. DID TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF DENY APPELLANT A FAIR TRIAL?
3. DID THE COURT ABUSE ITS DISCRETION UNDER FEDERAL RULES OF EVIDENCE 609(a)(1) AND (a)(2) IN DENYING APPELLANT'S MOTION TO EXCLUDE A PRIOR CONVICTION FOR SALE OF HEROIN SINCE ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE?

STATUTES INVOLVED

TITLE 28, UNITED STATES CODE

Section 455. Disqualification of justice, judge,
magistrate, or referee in bankruptcy

TITLE 28, UNITED STATES CODE

Federal Rules of Evidence

Rule 609. Impeachment by Evidence of
Conviction of Crime

STATEMENT OF THE CASE AND THE FACTS

On March 25, 1976, a Federal Grand Jury in Hartford returned a three count indictment charging Jesus Ortiz and Enrique Melendez with conspiring to distribute cocaine, possessing cocaine with intent to distribute it, and distribution of the substance, all in violation of Title 21, United States Code, Sections 841(a) (1) and 846.

On July 13, 1976, defendant Melendez moved to prohibit the use of his 1970 conviction for sale of heroin for impeachment purposes. On July 13, 1976, the Court denied this motion. (Record on Appeal). At the close of the Government's evidence, defendant Melendez took the stand outside the jury's presence to state he was aware that if he testified the Government could bring out this recent prior Federal narcotics offense and for that reason, he decided not to testify. (App. at 77-79).

In July of 1976, defendant Melendez' case was severed from that of Ortiz. Ortiz was then tried and convicted on all counts and sentenced by the Honorable T. Emmet Clarie, Chief Judge, on September 27, 1976, to seven years on each count concurrently and a three years special parole-term.¹

¹Ortiz appealed said conviction in Docket No. 76-1460. A Petition For A Rehearing En Banc is pending at this writing on that matter. United States v. Ortiz, F.2d (Slip Op. No. 76-1460, April 11, 1977).

On November 16, 1976, prior to the selection of a jury in the Melendez trial, counsel moved in chambers to disqualify Judge Clarie because he had sentenced Melendez in 1970, subsequently violated Melendez' Federal probation in 1973, and then sat as trial Judge in the July, 1976 trial of co-defendant Ortiz and subsequently sentenced Ortiz as stated above. This Motion to Disqualify or Recuse was denied. (App. at 7-15).

On January 5th and 6th, 1977, a trial was held on this matter. Mr. Melendez was convicted by the jury on all three counts and on February 14, 1977, the Court (Clarie, J.) sentenced Melendez to concurrent terms of seven years on each of the three counts in addition to a special parole term of three years.

The facts essential to this appeal are as follows: On February 4th and on February 9th, 1976, Rafael Valentin, an undercover narcotics officer with the Connecticut State Police, and Luis Lopez, an informant with a lengthy criminal background who was paid by both the Connecticut State Police and the Drug Enforcement Administration, for his efforts in their joint ongoing drug investigations, went looking for "Frankie" Melendez at 15 Cabot Street in Hartford, Connecticut, in order to purchase bulk weight cocaine from Frankie Melendez. (App. at 16). Instead, however, they only found the defendant, Enrique Melendez also known as "Kiki", on both occasions at 15 Cabot Street. (App. at 16). Enrique Melendez is the brother of Frankie Melendez.

On the first of these occasions, Enrique Melendez appeared mad at both Valentin and Lopez and ordered them to leave. (App. at 17). On the second occasion, the defendant apologized, and

then allegedly told Lopez, in Trooper Valentin's presence, that he would sell "bags" to Lopez alone but not to bring Valentin. Trooper Valentin said that they still wished to buy bulk cocaine from Frankie Melendez and were not interested in bags. (App. at 18-19). So Valentin and Lopez left 15 Cabot Street.

On February 10, 1976, Lopez and Valentin went to 15 Cabot Street to buy a quarter-piece of cocaine from Frankie Melendez (App. at 20-21; 28). A young man met Lopez on the second floor of the building while Valentin waited outside in plain view in front of 15 Cabot Street. (App. at 20). This person told Lopez "Frankie was not home" and "Kiki" (Melendez) was sleeping. Lopez started to leave but was called back by the young man. (App. at 28). Lopez met "Kiki" Melendez on the second floor and agreed to buy 15 bags of cocaine for \$180 from Melendez. (App. at 29).

Lopez went back outside to Valentin and obtained \$180 and went back in; he went to the third floor with Melendez where Ortiz sold him the cocaine. (App. at 30). Lopez claimed Ortiz passed the 15 bags to Melendez (App. at 30); that Melendez counted the bags and gave them to Lopez. (App. at 30). The \$180 then was claimed to have been given by Lopez to Melendez to Ortiz. (App. at 30).

It was brought out on cross-examination of Lopez that he gave a sworn statement to D.E.A. Agent Hoyt on February 19, 1976, soon after these events, in which he said Ortiz called him back

into the building, brought him from the second to third floors, and no "young man" was mentioned. (App. at 20,27;50-62). Lopez claimed Agent Hoyt made this serious mistake in the statement. Agent Hoyt was the case agent present at the trial. He did not testify.

Lopez' prior sworn testimony to the Grand Jury that indicted in this matter on March 24, 1976, about six weeks after the sale, was admitted as an Exhibit in the case. (Def. Ex. C; App. at 63-73). Therein Lopez clearly stated under oath that he received the 15 bags of cocaine from Ortiz and that he paid Ortiz for it. Lopez claimed at trial that he was "confused" before this Grand Jury, but that he did not tell the prosecutor or Grand Jurors of his "confusion". (App. at 66-68).

Lopez admitted several prior felony convictions plus parole violation and bond jumping offenses. (App. at 31-36). He admitted working for police agencies for the past twelve years and seeking their help when he got in trouble with the law. (App. at 32-34). Lopez was arrested two times while working for D.E.A. and the Connecticut State Police in 1975 and 1976. In one case, a State Trooper interceded to get Lopez a nolle and probation; the other arrest was for impersonating a police officer (since the Ortiz trial in July of 1976) which case was dismissed. (App. at 37-41; 42-45). Lopez agreed he had testified in other trials, that he got paid for the number of people he made cases on but denied that really was the case - he claimed he got paid for his time and

expenses actually. (App. at 46,47). He was paid for testifying in other narcotic trials and expected to be paid for testifying against Melendez. (App. at 48-49). Lastly, Lopez would not read prior statements or testimony shown him by defense counsel because he didn't have "his glasses" but then had no trouble reading without glasses when the prosecutor showed him documents. (App. at 75, 76).

PREJUDICIAL COMMENTS AND REMARKS MADE BY THE
ASSISTANT U.S. ATTORNEY IN HIS OPENING SUMMATION
DENIED APPELLANT A FAIR TRIAL

In his initial summation to the jury, the Assistant United States Attorney, without provocation from the defense, made a series of prejudicial remarks, drew unfounded inferences, unfairly characterized appellant and denigrated counsel. This Circuit has held that the deliberate introduction of inflammatory material by the prosecutor in summation constitutes reversible error if it prejudices the defendant's right to a fair trial. United States v. Burse, 531 F.2d 1151 (2 Cir. 1976). Unfair prejudice can arise as much from who makes the remarks, as from what is said. The Supreme Court in Berger v. United States, 295 U.S. 78 (1935), emphasized the powerful impact the prosecutor's position has on the jury and his responsibility to use that power fairly:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and a very definite sense the servant of the law, the two-fold aims of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a fair one.

It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Id at 88.

In the present case, the Assistant United States Attorney breached the duty laid down in Berger. He repeatedly vouched for the credibility of Luis Lopez, the Government's key witness. He insisted that Lopez would not lie "because he had no motive to lie". (App. at 97,101,105).

The prosecution in two different instances tried to shore up Lopez' credibility by claiming that Lopez would never have committed perjury. (App. at 97-98). There were glaring discrepancies between Lopez' grand jury testimony and the testimony he gave at trial. The Assistant U.S. Attorney claimed that this was not an indication that Lopez was lying, but that he was merely confused. (App. at 103).

Besides vouching for his witness' credibility, the Assistant U.S. Attorney told the jury what defense counsel would say and do in his closing argument. He claimed that Buckley would say that Lopez was a bounty hunter, and asserted that this was not true. He cautioned the jury not to disregard what Mr. Buckley would tell them to disregard. (App. at 99). He warned the jury that the defense attorney would try to attack Lopez' credibility by going over his criminal record and his grand jury testimony. (App. at 106,108).

Besides anticipating what Buckley would say about the concept of reasonable doubt (App. at 111), the Assistant U.S. Attorney insinuated in his summation that anything Buckley would say was a ploy, a defense attorney's trick, to get his client off. (App. at 110,111).

Finally, the prosecution also unfairly characterized the appellant, not once, but twice, as a "drug dealer". (App. at 85, 106).

The complete summation by Assistant U.S. Attorney Smith is reprinted in our appendix. (App. at 80-115). A few excerpts, however, will vividly illustrate to the Court, the improper conduct we complain of.

"If he was lying he would have made up something a lot simpler. He didn't. The reason he didn't is because he is not lying." (App. at 94).

"A person is not going to knowingly and willfully get on the stand in the United States District Court, in Federal Court - a person is not going to get on the witness stand in Federal Court and willfully and knowingly commit perjury unless he has got one, powerful motive - unless he has got a motive." (App. at 97).

"In short, ladies and gentlemen, there is no motive to lie. And he doesn't have a motive to lie, and he is not lying." (App. at 101).

"In short, ladies and gentlemen, the defense wants you to believe that Luis Lopez got up on that witness stand and knowingly and willfully committed perjury. The Government submits to you that he most certainly did not. He did not. He has been in jail before; he doesn't want to go back. And that is exactly where you go when you commit perjury in United States District Court. He is not going to do that. He has no motive to do this. He told you the truth, and you have got to decide whether you are going to believe it." (App. at 104-105).

"You should believe him." (App. at 106).

".....ladies and gentlemen, this is narcotics. And the people who sold this are dope dealers. Make no mistake about that, please." (App. at 106).

".....dope dealer knows he could get his lawyer to bring in these felony convictions, and throw in a red herring and ask the jury 'To give my guy a walk - give my client a walk, because the man he sold the dope to has a criminal record' ". (App. at 108-109).

"He is not a boy scout, but he is telling you the truth." (App. at 110).

In United States v. Burse, 531 F.2d 1151 (2 Cir 1976), this Court held that certain remarks made by the prosecution during summation were sufficiently prejudicial to require reversal. While the present case is not on all fours with Burse, it is sufficiently similar to require reversal.

This Court enumerated a number of reasons for reversing Burse's conviction:

- (1) the prosecution made improper and derogatory remarks about the defense attorney.
- (2) the prosecutor continually told the jury that he knew certain testimony was true; and
- (3) the case against Burse was weak so that the prosecutorial misconduct took on greater importance, irrespective of whether it was intentional or not.

The same elements that mandated a reversal in Burse are present here. The crucial issue in appellant's trial was the credibility of the Government's key witness, Luis Lopez, a paid informant and convicted felon. Lopez was the only witness who

testified that appellant actually took part in the alleged sale. In this connection, it is important to note that Lopez was paid by the number of convictions that resulted from his information and not for the information itself, and that he testified against appellant's former co-defendant, Jesus Ortiz, in a previous trial about the same matter.

The situation here is similar to the problem confronted by the Eight Circuit in United States v. Bledsoe, 531 F.2d 888 (8 Cir. 1976). That Court reversed appellant's conviction because the Government's case was weak and it was impossible to determine beyond a reasonable doubt whether the prosecution's decidedly improper comments in summation were prejudicial.

There were other instances of prosecutorial misconduct during summation, similar to ones that resulted in a reversal in Burse, supra. The Assistant U.S. Attorney made insinuating remarks about defense attorneys in general and their theatrical use of the concept of reasonable doubt.

Although there are a number of recent cases in this Circuit where improper remarks by the prosecution did not result in reversal, these cases are distinguishable.

In United States v. Bivona, 487 F.2d 443 (2d Cir. 1973), this Court found that the prosecutor's remarks were not prejudicial because they were made during rebuttal and in direct response to a "vicious attack" launched by defense counsel during his summation. In the instant case, the prosecution made prejudicial comments before defense counsel's summation. Also, the proof of guilt in

Bivona, supra was overwhelming and the judge gave careful remedial instructions concerning the prosecution's summation. Neither of these mitigating factors are present in the instant case. It is also significant to note that although this Court did not reverse defendant's conviction in Bivona, supra, it did note that, under certain circumstances, the same kind of misconduct would call for reversal. "Of course, where a defendant's constitutional rights have been violated by the police or the prosecutor, this sanction (reversal) must be applied." Id. at 447.

United States v. White, 486 F.2d 204 (2 Cir. 1973) is also distinguishable from the instant case. This Court in White refused to reverse although it acknowledged that the Assistant United States Attorney had improperly asserted his own belief in appellant's guilt. The panel was of the view that the proof of guilt was "clear and convincing."

United States v. Stofsky, 527 F.2d 237 (2 Cir. 1975); United States v. Wilner, 523 F.2d 68 (2 Cir. 1975); and United States v. Robinson, 543 F.2d 951 (2 Cir. 1976), cert. denied, U.S. , 97S.Ct. 139 (1976) are also distinguishable. In Stofsky, the prosecution's improper comments were provoked by inappropriate insinuations and inferences made by the defense. In Wilner, the prosecution's comments were made during rebuttal and in response to inappropriate assertions by defense counsel. The panel in Wilner also noted that the fact that defense counsel had not objected was an important factor to consider. Defense

attorney in the instant case objected immediately after the prosecutor's summation. (App. at 113-115).

In United States v. Robinson, supra, this Court did not reverse because the evidence of guilt was overwhelming.

Unlike the foregoing cases, there are no mitigating circumstances here for allowing this verdict to stand. The prosecutor did not make his comments in response to wild assertions by defense counsel; there is no overwhelming proof of appellant's guilt; the comments in and of themselves were entirely improper; and defense counsel objected to the Assistant United States Attorney's remarks at the conclusion of his summation. (App. at 80-115).

TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF
DENIED APPELLANT A FAIR TRIAL

In the instant case, defense counsel made an oral motion before trial (App. at 7-15) that the trial judge recuse himself from the case because (1) he had sentenced appellant on a prior federal narcotics violation and had available at that time appellant's pre-sentence report; (2) he had violated appellant's parole; and (3) he presided over the trial in which Jesus Ortiz, a co-defendant and alleged co-conspirator of appellant, was convicted for the same crime. Judge Clarie denied the motion.

Section 455 of the United States Code requires a trial judge to disqualify himself "Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. Section 455(b)(i).

The issue of recusal has arisen in numerous cases in this Circuit in the past few years, but there is no case precisely on point with the instance one.

In United States v. Simon, 393 F.2d 91 (2 Cir. 1968), this Court granted a writ of mandamus to prevent a District Court trial judge from presiding at a retrial where the original trial had ended with a hung jury. In granting the writ, this Court pointed out that it was standard practice in the Southern District of New York to have the second trial in a criminal case tried before a judge other than the one who presided at the first trial.

This Court said: "the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of impartiality". Id. at 91. The instance case does not involve a retrial, but appellant contends that Simon is controlling because Judge Clarie presided over the trial of appellant's alleged co-conspirator and former co-defendant, Jesus Ortiz. That trial involved the same alleged sale and the testimony of the same witnesses. Under the circumstances, appellant's trial for all intents and purposes was a retrial, so a new judge should have been appointed. Not to do so prejudiced his right to a fair trial and is reversible error.

Even if this Court does not find Simon to be controlling, appellant maintains that Judge Clarie should have recused himself in accordance with 28 U.S.C. Section 455(b)(1) because he was prejudiced against the appellant and had personal knowledge of disputed evidentiary facts. Judge Clarie's bias can be inferred from the fact that he had personal knowledge of appellant's past involvement with drugs and his prior run-ins with the law because he had sentenced him and violated his parole. He had personal knowledge of the disputed evidentiary facts in the case because he presided over Ortiz' trial where the testimony and evidence presented were the same as in the instant case.

The central issue in both cases was the credibility of Luis Lopez, a police informant who testified that appellant and Ortiz participated in the sale.

Both Ortiz and appellant denied this.

The standard in the Second Circuit for determining whether evidence presented at trial is sufficient to go to the jury is that the proof must be of such substance that a reasonable man could be convinced of guilt beyond a reasonable doubt. United States v. Wilson, 342 F.2d 43, 44-45 (2 Cir. 1965); United States v. De Sisto, 329 F.2d 929, 932 (2 Cir.), cert. denied 377 U.S. 979 (1964); United States v. Woodner, 317 F.2d 649, 651 (2 Cir.), cert. denied, 375 U.S. 903 (1963); United States v. Kahaner, 317 F.2d 459, 467-68 (2 Cir.), cert. denied, 375 U.S. 836 (1963); United States v. Leitner, 202 F. Supp. 688, 693, 94 (S.D.N.Y. 1962), aff'd. 312 F.2d 107 (2 Cir.); United States v. Lefkowitz, 284 F.2d 310, 315 (2 Cir. 1960).

Since Judge Clarie let the evidence go to the jury, it can be presumed that he believed Lopez' version of the story when he heard it at Ortiz' trial. He should have recused himself from appellant's trial as dictated by 28 U.S.C. Section 455(b)(1) because he had formed a personal opinion of the validity of disputed evidentiary facts.

In Berger v. United States, 255 U.S. 22 (1921), the seminal case on judicial disqualification, the Supreme Court held that "Bias or prejudice is a state of mind which can be proved only by facts and declarations from which it can be inferred.....Whether the judge is disqualified or not depends, then, not upon the mere fact that prejudice has been charged, but upon the facts which it is alleged tend to show such prejudice." Id. at 24

Defense counsel here alleged in his motion for recusal facts sufficient to show prejudice and personal knowledge of dispute evidentiary issues, (App. at 7-15) :

.....an affidavit¹ upon information and belief satisfies the section....., if it shows the objectionable inclination or disposition of the judge, which we have said is an essential condition....Berger at 35.

Since it is not necessary on a motion for disqualification for the judge to pass on the truth of the statements (Id. at 35), appellant's motion which showed the objectionable inclination and disposition of Judge Clarie was sufficient and should have been granted.

There have been several cases in this Circuit on this particular question. In not one of them has a reversal been granted on the ground that the trial judge should have recused himself. However, all of them are distinguishable factually and/or procedurally from the instant appeal.

In United States v. Bernstein, 533 F.2d 775 (2 Cir. 1976), cert. denied, U.S. (1976), this Circuit did not insist that the trial judge recuse himself because appellant's affidavit was insufficient. It alleged only inferences and failed to state any facts showing bias.

¹Defense attorney made the motion for disqualification under 28 U.S.C. Section 455(b)(1), not under 28 U.S.C. Section 144 so he did not have to file an affidavit. The standard for disqualification under both sections is the same however.

Bernstein, supra is distinguishable on its facts also. There the judge did not have any personal knowledge of appellants. His only connection with the case was that he sentenced several of appellant's alleged co-conspirators who had pleaded guilty.

This Circuit refused to grant a writ of mandamus in United States v. DiLorenzo, 429 F.2d (2 Cir. 1970) because (1) the motion for recusal, which was made under 28 U.S.C. Section 144, was not filed on time and (2) the supporting affidavit was insufficient.

DiLorenzo, supra involved seriatim trials of co-conspirators, but unlike the present case, the judge there had not had previous judicial dealings with the appellants and they failed to allege in their affidavit that his personal knowledge of the evidence adduced in the previous trial biased him against appellants.

Wolfson v. Palmieri, 396 F.2d 121 (2 Cir. 1968) is also distinguishable. This Court dismissed the petition for mandamus for lack of jurisdiction because petitioners had exhibited a lack of diligence - they made no motion to disqualify until after the Simon opinion, supra was handed down, and they made improper use of Section 144. The factual situation raised here is unique. Not only did the trial judge sit on seriatim trials of co-conspirators/co-defendants, but he had personal knowledge of and prior dealings with appellant. Under these circumstances, Judge Clarie's impartiality "might reasonably be questioned", 28 U.S.C. Section 455 (a) and he should have recused himself.

THE COURT ABUSED ITS DISCRETION UNDER
FEDERAL RULES OF EVIDENCE 609 (a)(1) AND (a)(2)
IN DENYING APPELLANT'S MOTION TO EXCLUDE A
PRIOR CONVICTION FOR SALE OF HEROIN SINCE ITS
PREJUDICIAL EFFECT FAR OUT-WEIGHED ITS PROBATIVE VALUE

On July 13, 1976, appellant moved to prohibit the use of a 1970 conviction for sale of heroin for impeachment purposes. On July 13, 1976, the Court denied this motion.

Rule 609, Federal Rules of Evidence, governs the impeachment of a witness by prior convictions. The policy behind the rule is to give defendants a chance to testify by protecting them against unfair prejudice, while at the same time not allowing them to appear before the jury as "pristine". Rule 609(a)(1) permits the admission of prior convictions only if "the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant". Fed. R. Evid. 609(a)(1). Fed. R. Evid. 609(a)(2) on the other hand provides that evidence of convictions involving "dishonesty or false statement (crimen falsi)....shall be admitted".

A prior conviction for the sale of heroin does not fall within the category of "crimen falsi". In United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976), the court refused to allow the impeachment of the defendant who had admitted on cross-examination that he had in the past pleaded guilty to a charge of possession of heroin. In making this ruling, the Court relied on the definition

of crimen falsi given in the Joint Explanatory Statement of the Committee of Conference of the House and Senate:

By the phrase "dishonesty and false statement", the Conference means crimes such as perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involved some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. United States v. Millings, supra at 123.

Under no circumstances does a conviction for the sale of heroin fall within this category as being "peculiarly probative of credibility".

Under 609(a)(1), the trial judge in deciding whether to allow a witness to be impeached, must determine whether the probative value of the conviction is outweighed by its prejudicial effect. This Court in United States v. Palumbo, 401 F.2d 270 (2 Cir. 1968), cert. denied, 394 U.S. 947 (1969), outlined several factors to be considered in making this determination. The panel went on to say that a trial judge could exclude a prior conviction if

.....he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly. United States v. Palumbo, supra at 273.

Under this standard, a heavy burden rested on the defendant to justify exclusion from evidence of his prior conviction. This case, however, was decided prior to the reenactment of Rule 609(a).

The new Rule, in contrast, favors exclusion by (1) putting the burden on the Government to justify admission, (2) eliminating the notion that only "substantial" and "unfair" prejudice is pertinent, and (3) limiting the relevant judicial examination of prejudice to that accruing to the defendant. This new formulation was endorsed by the District of Columbia Circuit in United States v. Smith Slip Op. Nos. 75-1920, 1941 (Dec. 17, 1976). Under the new standard, it was error for the trial judge to refuse to exclude appellant's prior conviction.

The issue under Rule 609(a)(1) is not simply whether the prior conviction bears on the witness' credibility. After all, it may well be argued that any intentional violation indicates a disregard for all legal obligations. But Congress has not chosen to adopt such an expansive theory. The question is whether the degree of probative value outweighs the prejudice to the defendant. In the instant case, it clearly did not. The probative value depended solely on a vague and uncertain inference about the type of person who would have ever sold drugs. On the other hand, the prejudice to the defendant was substantial. The prosecution's case was weak. The only one who testified that appellant participated in the sale was a government informant who was paid by the number of individuals he could involve in a sale. The defendant's testimony on his own behalf would have been crucial. United States v. Brown, 409 F. Supp. 890, 892 (W.D.N.Y. 1976). But he was denied

this chance by the trial judge's refusal to exclude his prior conviction.

A critical element in this equation weighing the probative value against the prejudicial effect is the fact that the prior offense and the current charge were strikingly similar.

In Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968), the court held that:

Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime, because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." Ibid. at 940

In United States v. Brown, 409 F. Supp. 890, 893, 894 (W.D.N.Y. 1976), a federal court dealt with a fact situation almost identical to the present case. There, the prior crime was a relatively recent sale of narcotic drugs, and the new indictment was for distributing heroin. The Court said:

When....the prior crime parallels that for which the defendant witness is being tried, the quantum of prejudice to the defendant is magnified and, when the prior crime embodies falsification or fraud or stealing (not the situation now presented), it has great probity concerning credibility. United States v. Brown, supra at 893-894.

The Brown court distinguished the holdings in Palumbo cited supra and United States v. DiLorenzo, 429 F.2d 216 (2 Cir. 1970), since those convictions involved fraud and stealing -- crimes which bear directly on credibility, and moreover those convictions did not involve crimes similar to the ones for which the defendants were on trial.

Finally, the court held "that an old narcotics conviction has but little bearing re: credibility of a witness but possesses great prejudice to a defendant witness charged with a parallel criminal charge".

Given the extremely limited probative value of the prior conviction on the issues of credibility, the factors pointing to prejudice should have required its exclusion under the test of 601(a)(1).

In United States v. Ortiz, Slip Op. No. 76-1460 (April 11, 1977), a trial involving appellant's alleged co-conspirator, this Court declined to reverse a conviction on the grounds that the trial judge had abused his discretion in refusing to exclude Ortiz' prior conviction. The majority opinion in that case was based on a misapprehension of the governing law. The panel used the standard enunciated in Palumbo, supra, ignoring the fact that Rule 609 had been re-enacted. Thus, Ortiz should not be considered as controlling and appellant's conviction should be reversed.

CONCLUSION

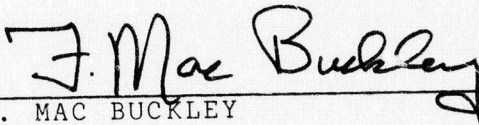
For the foregoing reasons, the appellant respectfully requests that the judgment of conviction be vacated and that the case be remanded for a new trial.

THE DEFENDANT:

By F. Mac Buckley
F. MAC BUCKLEY

C E R T I F I C A T I O N

This is to certify that a copy of Appellant's brief
and appendix was delivered this 27th day of May, 1977 to Assistant
U.S. Attorney, Thomas P. Smith.


F. MAC BUCKLEY